Supreme Court, U.S.
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88-455

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1988

ROGER J. DE WIEST, Petitioner

v.

TARLETON STATE UNIVERSITY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

ROGER J. DE WIEST

P.O.Box 20034
Tallahassee, Florida 32316
(904) 877-7981
Proceeding Pro Se

August 16, 1988

QUESTIONS PRESENTED

1. The original complaint was structured to allege violations of U.S.C.§1981,in light of the sanctions requested. Should not, in the interest of justice, the District Court at Pre Trial have asked for a substitution of §1981 in lieu of §2000e et seq., rather than ordered a change of sanctions?

2. Was the Civil Rights Act of 1866 not applicable anyway and was the Supreme Court decision No.85-2169 not the confirmation that this always had been the case?

3. If a State(Attorney General) in reply to an original complaint denies facts which have been published by that State (organism of) and then suppresses the evidence in District Court, does it not violate the Due Process Clause of the XIVth Amendment?

4. Granted that the Supreme Court is not

just another court of errors and appeals, can it nevertheless not intervene when the decision below represents a flagrant flouting of justice which is bound to have a damaging repercussion on the image of the United States abroad?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Roger J. De Wiest and the respondent Tarleton State University.

The respondent before this Court is Tarleton State University.

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v.

TARLETON STATE UNIVERSITY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Roger J. De Wiest respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on April 19, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not been reported. It is retyped in the appendix hereto, p.21a,infra.

The memorandum opinion of the United States District Court for the Northern District of Texas has not been reported. It is retyped in the appendix hereto, p.7a, infra.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. 2000e et seq., the petitioner brought this suit in the Northern District of Texas. On August 31, 1987, the Northern District Court dismissed the suit. See p.7a, infra.

On petitioner's appeal, the Fifth Circuit on April 19, 1988 affirmed the above decision. See p.7a, infra. In view of petitioner's upcoming examinations at the Law School of the University of Ghent, Belgium, no petition for rehearing could be sought.

On July 20, 1988, Justice Byron White ordered that the time for filing this petition for writ of certiorari be extended to and including August 17, 1988.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C.§1254(1).

STATUTE INVOLVED

28 U.S.C.§1291.Final decisions of district courts.

The courts of appeals(other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited

to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

Petitioner came to the U.S. as a foreign student from Belgium in 1954. After receiving his Master's degree in Civil Engineering from the California Institute of Technology, he obtained his Ph.D. degree from Stanford University. Upon graduation he became an Assistant Professor at Princeton University in 1959, obtained tenure after two years and became a full Professor four years later.He served at Princeton from 1959 till 1976 as the leading scientist of the Princeton Water Resources Program of which he became the Chairman in 1970.

While at Princeton he became a Member of the Board of Directors of the Belgian American Educational Foundation, Herbert Hoover Founder. He acquired U.S. citizenship in 1963. He left Princeton in 1976 to

practice medicine in Brussels, Belgium,till 1982. Denied admission to U.S. medical schools for reasons of age and origin, Petitioner shuttled forty-five times across the Atlantic Ocean to become a medical doctor at age forty-nine. See Night Flight to Brussels.

Since the District Court rejects Petitioner's claim for a prima facie case of discrimination essentially on the contention that Petitioner is not similarly situated with respect to some other professors, U.S. born, an excerpt of Petitioner's C.V. is necessary.

Winner of the 1963 Freeman Prize in Hydraulics of the American Society of Civil Engineers and the 1987 C.V.Theis-Award of the American Institute of Hydrology, Petitioner was a lecturer or consultant in hydrology to over forty-five leading universities throughout the world. In 1965 he was selected by eight U.S. scientific societies

and federal agencies as the nation's leading geohydrology professor for the $45,000 hydrological study of the Texas Gulf Sulphur phosphate mines in N.Carolina(N.C.Dept.of Water Resources). In 1968 he was the U.S. delegate to a five-member panel of International Experts in Groundwater Hydrology, United Nations (USA,USSR,Japan,France,Israel).

Petitioner is the author of numerous scientific and professional papers and author and co-author of three books in hydrology and related subjects.(Geohydrology, Hydrogeology and Flow through Porous Media). Two of his books have been translated into Russian by the Russian State Press MIR; both books are bestsellers in the USSR as well as in the U.S. On the other hand, Petitioner himself translated the Russian Classic on The Theory of Groundwater Movement by Polubarinova-Kochina into English.(Princeton U.Press).

In 1971, as a Senior Hays Fulbright-Hays

Scholar, Petitioner served in the capacity of NATO Professor to Iceland. He defined the concept of "true environmental water head" which in 1974 became indispensable in dealing with the hydrological problems confronting Saudi Arabia.

In 1974, The Encyclopaedia Britannica published his leading reference paper on Groundwater Hydrology.

While practicing medicine in Brussels (1976-1982), and prior to coming to Tarleton, Petitioner was a Visiting Professor of Hydrology at Louvain University, Belgium (1980-1982).

Since he returned to the U.S. in 1982, Petitioner brought six Belgian students to the U.S., three of them at the graduate level in engineering and science. As " Engineering Programs in U.S. depend on Foreigners", Civil Engineering, Aug.1988, p.26, this study raises the question whether U.S. industry and the academic com-

munity could function as usual if the number of foreign engineers and students were to drop.

On June 14, 1983, Albert Ball, Cultural Affairs Officer for the Embassy of the United States in Brussels sent the following letter to Petitioner:

"On behalf of Ambassador Vest, I should like to express my sincere appreciation for your energetic involvement in the defense of the public image of the United States. .....Since your Belgian origins grant you more credibility in this country than our own often do, we appreciate all the more your active contribution to the cause of the better understanding between our two peoples."

Denied admission to the Florida State Law School, " because they only take the top 2 to 3 % of the undergraduates ", while Petitioner has no undergraduate record in the U.S. and was only No.1 at

Caltech, Stanford and Medical School, Petitioner, a summa cum laude undergraduate in Classics, at 62 embarked in a commuting venture to the University of Ghent, Belgium, in order to obtain the five-year Law Licenciate which would make him eligible for the LL.M. at Harvard, in the tradition of the best Belgian students.

(a) Course of Proceedings and Disposition in court Below.

(1) On April 26, 1985, in the U.S.District Court of Texas, Fort Worth Division, Petitioner filed a complaint against Tarleton State University for civil rights violations. It is retyped in the appendix, p.1a,infra.

(2) A pre-trial Conference was held on 27 April, 1987, before Judge Eldon B. Mahon, during which Petitioner was compelled to drop his claim for punitive damages and to replace it by a claim for differential pay, attorney's fees, costs and reinstatement.

(3) On June 17, 1987, as a result of the May 18, 1987 decision by the Supreme Court,

No.85-2169, Petitioner filed a Motion to Amend (complete) his original complaint, in order to restore his original claim for punitive damages.

(4) On August 31, 1987, the District Court denying the existence of a prima facie case of discrimination,dismissed the suit. (Appendix 7a,infra).

(5) On April 19, 1988, the Court of Appeals for the Fifth Circuit affirmed the above decision.(Appendix 21a ,infra).

(b)Statement of Facts

(1) On July 11,1983, Petitioner was offered by Tarleton State University (T.S.U.), simultaneously but in competition with each other,the positions of Distinguished Professor and Director of the Hydrology Division. At Petitioner's request, the two positions were consolidated into one at a salary of $31,500 for nine months during the 1983-84 academic year or an annual salary of $42,000 with summer employment contingent

upon the University's needs. Petitioner accepted a two-year probationary period after he was led to believe that this was the minimum period for every professor.

(2) At approximately the same time, without Petitioner's knowledge, T.S.U. hired three full professors as department heads at salaries of approximately $6,000 per year above Petitioner's. The department heads L. Mottola, J.Dehaye and B.Collier were hired in the departments of accounting and finance, general business and computer information.

(3) T.S.U. had obtained from the Texas Legislature the funds to establish an undergraduate program in hydrology. Only two such programs in the Nation, at the Universities of Arizona and New Hampshire, are successful, where they coexist with strong graduate programs.

Dr.Thompson, President of T.S.U., in the Fall of 1983 Tarleton Campus Guide said :

"I believe the Tarleton Program will become nationally prominent within the next five years."Petitioner, as Distinguished Professor was advertized and publicized in the Stephenville Empire Tribune and Fort Worth Starof July 22, 1983. A $ 3 million grant was awarded to T.S.U. by the Texas Legislature to construct a building for hydrology, emphasizing the importance of the Program in the eyes of Texas.

(4) In the Spring of 1984, Petitioner sought to recruit Nazeer Ahmed, from Colorado State University, author of Fluid Mechanics, a native of Pakistan, naturalized U.S. citizen, as Associate Director of the Hydrology Program. Ahmed was rejected by the Administration of T.S.U. for the sole reason that he was a Pakistani.

(5) Subsequently Petitioner sought to recruit Dave Kraemer,native U.S.citizen, young Ph.D. graduate from the University of Arizona, virtually without teaching ex-

perience and publication record, as a beginning Assistant Professor, essentially at the same salary as Petitioner's, namely $31,000 for 9 months. The 1983-84 T.S.U. Budget provides indeed the same salary for the Distinguished Professor and Director of Hydrology as for the Assistant Professor. Kraemer declined the offer, in the first quarter of 1984.

(6) On April 16, 1984, after a careful review of the Status of the Hydrology Program, Dean Lamar Johanson expresses no shortcomings to the detriment of Petitioner and concludes as follows: "In general my impression of the program is quite favorable with many positive accomplishments, but I do have one great concern that is the lack of majors in the program." He also suggested that the major responsibility for recruiting be left to an Associate Director.

(7) On April 20, 1984, after Kraemer had declined the offer, Rueben Walter, after a

~~after a~~ thorough review with his superior Lamar Johanson of Petitioner's performance in the past year recommended Petitioner for tenure. Walter is Associate Professor and Head of Physical Sciences.

(8) However, one week later, Petitioner, having no choice but to recruit as Associate Director an immigrant for lack of U.S.born candidates, started a move to hire Shashi Mathur, a native of India, Ph.D. from the University of Delaware, and after a long battle with the Administration succeeded in obtaining the hiring of Mathur not as an Associate Director but as an Assistant Professor at $25,000 for 9 months, or $ 8,000 per year less than was offered to Kraemer. The compromise was concluded on May 11, 1984, one day before the end of the term when Petitioner left for California to engage in hydrological field work.

(9) Upon his return from California, on September 4, 1984, Petitioner was informed

by Rueben Walter thatPetitioner's positive tenure recommendation was in danger. Between April 20, 1984 and September 4, 1984, Petitioner had been absent from Campus and nothing had transpired that would justify the rescission of a positive tenure recommendation, but for the hiring of an Indian national against the will of the Administration.

(10) On November 13,1984, Walter put in writing what he had planned as early as Summer 1984, namely a recommendation that tenure not be granted to Petitioner.

(11) On December 3, 1984, the Tenure Review Committee voted 7 to 1 to not grant tenure to Petitioner. This Committee was illegally constituted, as it contained three members of the English Department, and since according to p.18, Role of Faculty and Staff of the Tarleton Faculty Handbook 1984-85, "no more than two committee members can be from the same Department." Petitioner was

informed of the vote on December 14, 1984. The majority of the 7 members of the Tenure Committee who voted against tenure for Petitioner did not belong to the discipline of natural sciences, as apart from the three English professors, one sociologist cast a negative vote. Two biologists and one geologist also cast a negative vote while the only mathematician on the Tenure Committee voted in favor of Petitioner. The majority of the negative vote came from laymen incompetent in hydrology and therefore incompetent to judge Petitioner. It is a long and well established procedure in the Texas A & M University System, in the matter of tenure and promotion, for the Chairman of the Tenure committee, to go and seek advice from outside referees to ensure serenity, equity and competence in the tenure process. By failing to do so, T.S.U. violated the Due Process of the 14th Amendment of the U.S.Constitution.

REASONS FOR GRANTING THE WRIT

I.

The District Court has erroneously decided that Petitioner did not have a prima facie case of discrimination with respect to compensation essentially because Petitioner is not similarly situated with other professors, which is false.

This contention is in error for the following reasons:
Reference is made to McDonnell Douglas v. Green,411 U.S.792(1973).

Even if one would assume - against the long and well established practice in U.S. Academe - with the District Court that those "market-bound" professors mentionned in the original complaint command a higher salary than Petitioner as Distinguished Professor and Director because " they supervise a number of employees" (Memorandum Opinion pp.16a,17ainfra), and therefore if one subtracts their sala-

ries from the total of the ten Professors-Head salaries (Respondent's Exhibit 1 at Pretrial, Petitioner's Exhibit 5 in Record of Excerpts), then one finds that the average salary of the remaining seven "non market bound" Professors-Head, U.S.born, is still 11.2% or $4,880 higher than that of Petitioner immigrant.

Respondent arrives at a 5% differential in his Exhibit by lumping into the salaries of the ten Professors-Head, the salaries of 2 Instructors, of 2 Assistant Professors and of 3 Associate Professors, and this of course introduces a bias.

A fortiori, the argument can be made much stronger if one situates Petitioner among the run of the mill type of full professors, whose average salary according to the District Court was about 5% higher than Petitioner's, $32,892 compared to $31,500, in the District Court's Footnote 3/. page 20a, infra.

What would the Honorable Judge say if he, as an immigrant, were proclaimed a Distinguished Judge of world acclaim and then would have to settle for a salary 5% less than that of the average judge?

Does this not prove the veracity of the prima facie case? Why does the Honorable Judge not similarly situate Petitioner with the other 25 (at the time) Distinguished Professors of the Texas A & M University System?

II.

The District Court claims that there was no discrimination in "probationary period" because, on hearsay or testimony, it was Petitioner's idea who " welcomed the two-year period in order to prove himself". (p.17a,infra).

These statements are completely false and incompatible with logic. Distinguished Professors do not have to prove themselves and Petitioner is no masochist. Petitioner

just had completed two years of hydrology teaching at Belgium's University of Louvain. Louvain, founded in 1425, is a world class University. Said the Tarleton Campus Guide, Fall 1983 :"De Wiest will come to Tarleton from the University of Louvain,Belgium, to ...."

Furthermore in all but one State of the Union, Princeton, where Petitioner acquired tenure in just 2 years, is rated higher than Tarleton.

Would Dan Marino, Joe Montana, or Danny White for that matter, have requested a two year probationary period to quarterback the Tarleton football team to prove themselves?

The District Court's opinion violates all common sense. In comparison, the Court of Cassation of Belgium, the counterpart of the U.S. Supreme Court in similar cases, voids all opinions by the Courts of Appeals which violate logic.

III.

The District Court claims that there is no prima facie case as to tenure but fails to explain, in a reasonable way, why a positive tenure recommendation made on April 20,1984, was rescinded and changed into a negative one on September 4,1984.

There was considerable disagreement between petitioner and the Administration first about the hiring of Nazeer Ahmed, Pakistani national, naturalized citizen and then, after April 20, 1984 and before May 12, 1984, about the hiring of Shashi Mathur which led to several heated discussions. The testimony by Dr. Robert Fain (pp.11a and 12ainfra) to the contrary is false. Whatever transpired relative to Mathur when he was at Tarleton is irrelevant to this case. Mathur stayed sufficiently long to secure a "green card" and in May 1988, after solliciting the help of Petitioner (Reply to Appellee's Brief, p.20), returned to his native India.

In fact, since Petitioner was absent from Campus and engaged in hydrological field work in California between May 12, 1985 and September 4, 1985 - which led to two publications as evidenced in Petitioner's Brief for Appellant - nothing had transpired that would justify the rescission of the positive tenure recommendation, but for the heated arguments about the hiring of an Indian national.

Stephenville is located in rural, xenophobic Texas. It suffices to say that the 1986-87 Tarleton Faculty contained 172 Members up from the Instructor's level. There is exactly one foreign national, a non-tenured associate professor, who is a U.S. citizen. This statistical showing may be sufficient to make a prima facie case of employment discrimination. Stewart v. Marquette Tool & Die Co.Inc. D.C.Mo 1976, 420F. Supp.478 , affirmed 527 F.2d 137.

The District Court gullibly believes

Dr.Cushman, English Professor, member of the Tenure Committee, that Petitioner had not been granted tenure because of lack of publications and lack of University service. While Petitioner served normally for two years on the Library Committee and the "Research" Committee - which does not show lack of university service - Rueben Walter who rescinded the positive tenure recommendation certainly knew about the progress of Petitioner's hydrological field research and the forthcoming publications, two of them being typed in his Department.

Apart from this,any homo sapiens in Academe knows that it is impossible to have published a novel scientific work within one year after the incipience of a new job, for it takes that much time to have the paper reviewed.

Moreover, Tarleton did not have any research facilities nor laboratories at the time.

At the time of the pre-trial hearing, the biggest stumbling block for Petitioner to establish a prima facie case was the first element of the McDonnell Douglas triad,to wit whether Me-gicans (Mexicans) did and whether Bel-gicans (Belgians) did not belong to a protected class. This stumbling block was removed in the period that elapsed between the pre-trial hearing and the trial itself by Saint Francis College v. Al-khazraji, No.85-2169 U.S. SupremeCt.

Deprived of its ammunition, the District Court had to scramble for the defense of its pre-judgment.

IV.

The Present Case is a Direct Prolongation of Saint Francis College v. Al-Khazraji, No.85-2169 U.S. Supreme Ct.(Conflicting decisions Courts of Appeals)

It may be considered as the equivalent

of a class action suit in which Petitioner represents a vast class of foreign scientists and engineers without which U.S. education in science and engineering simply could not survive. Nowadays, with the considerable supply of Asiatic gray matter which is perhaps more amenable to paternalism than that of its emancipated European counterpart, discrimination against W. Europeans is alarmingly on the rise, especially in the South of the U.S.

Therefore it was most refreshing to see an Asiatic, Al-Khazraji, stand up and the Supreme Court's decision in this case is a well in the desert of discrimination. Finally it was made clear that the Civil Rights Act of 1866 applies to all ethnic groups and de facto grants the same rights to all immigrants, even white Caucasians, as those enjoyed by white U.S.born citizens and by blacks who so far had benefited most of the 1866 Act.

Petitioner's case is a carbon copy of the Al-Khazraji case in the following respects:

1. In both cases the issue involves denial of tenure by a College Employer and its Tenure Committee, to a foreign-born professor, naturalized U.S. citizen.
2. In both cases, Plaintiffs, proceeding pro se, filed complaints in the District Courts alleging a violation of Title VII of the Civil Rights Act of 1964 and claiming discrimination based on national origin.
3. In both cases amended complaints were filed, adding claims under 42 U.S.C. §§ 1981, 1983, 1985(3) and 1986.
4. In both cases the District Courts dismissed the claims, in part or amended, as untimely.

However in appeal, the decision of the Fifth Circuit is not analogous with the previous decision of the Third Circuit.

CONCLUSION.

Far from a vituperative critique of which Petitioner in his Reply to Appellee's Brief is accused by the Court of Appeals, Petitioner's appeal is compatible with the principles of freedom of speech guaranteed by the First Amendment of the U.S. and for that matter even with Articles 49 and 50 of the 1977 Constitution of the USSR (R.C. Van Caenegem, Public Law, Ghent University Law School)

When a State(Texas) wants to suppress evidence which originated from within that State but is of such nature that its publication is harmful to that State, it does neither act as a democracy nor as a State of Law (Etat de Droit) but as a dictatorial regimen. In such regimens no fraud by the State is possible, the State is infallible and the interest of the individual at all times is subordinate to that of the State. It is clear from the Record on Appeal that

Attorneys for Respondent believe to work in such a State.

Petitioner sadly regrets the many irregularities of the Trial which in the long run became nothing but a farce. A farce of this nature, however, if not corrected, is not likely to contribute to a better understanding between the peoples of Belgium and the U.S., as expressed in the letter on behalf of Ambassador George S.Vest, presently Director General of the U.S. Foreign Service, Wahington, D.C.

A farce of this nature to the detriment of a Distinguished (in Respondent's own words) Professor of international acclaim, committed in a wave of xenophobia and bigotry by a few zealots, can only damage the image of the U.S. in W.Europe and is bound to have an impact on European student influx when it reaches the news media.

Petitioner regrets the injection of the "personality" vector by the Trial Judge

into this case. This was never an issue and the Judge's discovery - while it is publishable within one year unlike Petitioner's scientific work - can only bear witness of his emotional involvement in the case.

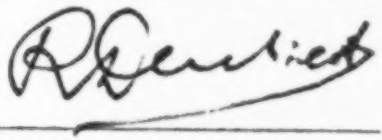
Petitioner is every inch the gregarious Princeton soccer player as he looks in the picture, showing no disdain for Tarleton nor for Texas.

Wrote the Fort Worth Star Telegram of July 22, 1983, quoting Respondent verbatim: "It's kind of a fairy tale when you look at it that Tarleton State gets this program and then gets this man!"
FAIRY TALE! Indeed, it belongs to the soap opera DALLAS.

But Petitioner, in 1963, when he became a U.S. citizen, changed his initials from J.R. into R.J.-Besides, it would be impractical to move the U.S.District Court from Fort Worth to its sister city Dallas.

For these various reasons, Petitioner humbly prays the Supreme Court that this petition for certiorari be granted.

Respectfully submitted



ROGER J. DE WIEST

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Proceeding Pro Se

August 16, 1988

An American in Brussels

Roger J.M. De Wiest

Cal Tech - - Stanford

Photo by L. Geeroms Aug 1982

dedicated to PRINCETON UNIVERSITY

Tarleton Texas A & M

APPENDIX

TRANSCRIPT ORIGINAL COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH FIVISION

ROGER J. DE WIEST, Plaintiff vs. TARLETON STATE UNIVERSITY Defendant	CIVIL ACTION No. 4-85-212-E

Jurisdiction

The allegations constitute violations of civil rights and therefore qualify for civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e,et seq. A Federal Court, in this case the U.S.District Court for the Northern District of Texas has jurisdiction in the present litigation.

COMPLAINT

Plaintiff was discriminated against in salary and probationary period when hired for reasons of national origin, and, in spite of an "enforceable promise", was refused tenure after 2 years, for reasons of national origin and for having engaged in the recruiting in his Hydrology Program of an Assis-

tant Professor of Indian nationality and of non-Caucasian race. (Native U.S. candidates were not available or had refused the job).

Demand

Plaintiff requests that Defendant be cited to appear and that in final hearing Plaintiff be awarded

1. Damages in the sum of 1.4 million dollars.
2. Interest after Judgment at the maximum legal rate.
3. Compensatory damages, travel expenses, attorneys'fees, together with costs and disbursements of this action.
4. Costs of suit.
5. Such other further relief and damages as the Court deems proper.

Dated

April 26, 1985

Signed

Roger J. De Wiest

Enclosure: Plaintiff's complaint dated Feb.27, 1985, to the E.E.O.C., Dallas District Office.

TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROGER J. DE WIEST, Plaintiff v. TARLETON STATE UNIVERSITY, Defendant	CIVIL ACTION No. 4-85-212-E

MOTION TO AMEND(COMPLETE) ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff Roger J. De Wiest, proceeding pro se, and submits motion to amend his original complaint, adding that allegations constitute violation of civil rights which qualify under the Civil Rights Act of 1866, 42 U.S.C., Sections 1981, 1983, 1985(3) and 1986.

In support of this Motion, Plaintiff would show that he intended all along to sue for punitive damages as shown in the Pre-Trial Hearing, that the recent (May 18, 1987) decision of the Supreme Court No.85-2169, Saint Francis College v. Al-Khazraji, is a new element which entitles Plaintiff to effectively sue for punitive damages, and that the bur-

den of proof for Plaintiff remains unchanged, leaving the Defense unaffected.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that this Motion be accepted.

Signed this 17th day of June, 1987

Respectfully submitted,

ROGER J. DE WIEST

TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROGER J. DE WIEST	
VS.	CIVIL ACTION No. 4-85-212-E
TARLETON STATE UNIVERSITY	

ORDER

On June 29, 1987, the first day of trial of this case, the Court ordered Plaintiff's Motion to Amend (Complete) Original Complaint and Defendant's Opposition to Plaintiff's Motion to Amend filed. These motions were previously returned by the U.S.District Clerk's Office for failure to comply with Local Rules. After considering plaintiff's motion to add allegations under 42 U.S.C. §§ 1981, 1983, 1985(3) and 1986, the Court finds that such amendment is untimely and to permit an amendment would not be in the interest of justice. Fed.R.Civ.P.15(a). Accordingly, the Court DENIES plaintiff's motion to amend. This case will proceed on Plaintiff's Title VII claims only.

Signed this 29th day of June, 1987.

ELDON B. MAHON
UNITED STATES DISTRICT JUDGE

TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROGER J. DE WIEST	
VS.	CIVIL ACTION No. 4-85-212-E
TARLETON STATE UNIVERSITY	

JUDGMENT

For the reasons presented in its Memorandum Opinion, the Court finds that Plaintiff should take nothing by reason of his suit. It is therefore ORDERED, ADJUDGED and DECREED that Plaintiff take nothing by way of his suit against Defendant, and that this matter be DISMISSED with each party to bear their own costs of action.

Entered this 31st day of August, 1987

ELDON B. MAHON
UNITED STATES DISTRICT JUDGE

TRANSCRIPT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROGER J. DE WIEST

vs. CIVIL ACTION No.
4-85-212-E

TARLETON STATE UNIVERSITY

MEMORANDUM OPINION

Plaintiff, Roger De Wiest, brought this action against Defendant, Tarleton State University, Stephenville, Texas, (T.S.U.), pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.). Plaintiff, a naturalized United States citizen born in Belgium, alleges employment discrimination on the basis of national origin. This action was tried before the Court on June 29-30, 1987.

Plaintiff's Claims

Plaintiff claims that he was discriminated against based on the following alleged acts:

1. Plaintiff's salary was $6,000.00 less than / three full professors hired at approximately the same time. (Correction : / that of) by petitioner

2. Plaintiff's salary was less than the salary of his successor, an associate professor.

3. Plaintiff's salary was less than (that of)[correct] other department heads who had less rank than he did as a Distinguished Professor.

4. Plaintiff's "probationary" period was two years instead of the customary one year.

5. Plaintiff was denied tenure because he recommended and hired Shashi Mathur, a non-caucasian of Indian nationality, for the position of assistant professor.

6. Plaintiff was denied tenure because of his national origin.

JURISDICTION

The Court has jurisdiction over this cause under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e),et seq. Plaintiff has satisfied the procedural requirements of his Title VII claim. Tarleton State University is an employer as defined in the Civil Rights Act of 1964.

FACTS

Plaintiff, originally of Belgian national ori-

gin, is a naturalized United States citizen. On July 11, 1983 Plaintiff was hired by T.S.U. as a Distinguished Professor and Director of the Hydrology Program at a salary of $31,500.00 for nine months during the 1983-84 academic year or a yearly salary of $42,000.00 with summer employment contingent upon the University's needs for Plaintiff's services. Plaintiff worked only 9 months in 1983-84. Plaintiff's employment contract also outlined that he was to complete a two-year probationary period. At approximately the same time T.S.U. hired three full professors as department heads at nine-month salaries approximately $6,000 per year above Plaintiff's salary. These department heads L.Mottola, J.dehaye, and B.Collier, were hired in the Departments of accounting and finance, general business, and computer information. Each of these departments is in the area of business which is the largest academic concentration at T.S.U. involving approximately 25-30% of the student body. Additionally each of these professors were hired as department heads rather than directors of a program. The title

of deparment head outranks that of a director of a program; for example, as the Director of the Hydrology Program, Plaintiff was immediately aacountable to the Physical Sciences Department Head, T.C.Hinkson. Conversely, Plaintiff testified on cross examination that there were only a small number of students in Hydrology, and he did not supervise any professors at the time he accepted the position.1/ (1/: see end of transcript). Furthermore, he was hired as a Director of the Hydrology Program although he was additionally given the title of "Distinguished Professor" because of his international reputation.

Plaintiff was responsible for the development of the Hydrology Program at T.S.U. The University was interested in developing its Hydrology Program into one of national prominence which included the awarding of an undergraduate degree in Hydrology.2/ (end of transcript). Thus, Plaintiff was responsible for recruiting students and faculty, financial procurement activities, overseeing the development of the hydrology building, and administering

the curriculum and internship program.

On November 23, 1983, only three months after Plaintiff began employment, T.C. Hinkson, Head of the Department of Physical Sciences, wrote Plaintiff a memorandum. This correspondence outlined Dr.Hinkson's concerns with Plaintiff's relative inactivity in the fledgling Hydrology Program at T.S.U. After one year, Dr.Rubin Walter, testified that Plaintiff had in fact only visited one high school for the purpose of recruiting students.

In Spring of 1984, Plaintiff sought to recruit Nazeer Ahmed from Colorado State University as Associate Director of the Hydrology Program. Ahmed was a native of Pakistan. Defendant's administrators preferred Dave Kreamer, a native-born United States citizen, for the position of associate director. He was offered this position, but he rejected it. Sashi Mathur, a citizen of Indian nationality, was hired as Associate Director of the Hydrology Program in Spring of 1984. From the testimony of Dr. Robert Fain, Director of Academic Affairs at T.S.U., there was never any discord between Plaintiff and

the administration concerning the hiring of Mathur.

During the fall semester of 1984, Plaintiff lectured seven times in Wesley P. James' graduate course in Hydrology at Texas A & M University (T.A.M.U.) Also during the fall semester 1984, Plaintiff attempted to obtain a joint appointment for himself at T.S.U. and T.A.M.U. that entailed a 50-50 distribution of time and energy at each school.

On August 7, 1984, Dr.Rueben Walter corresponded with Dr.Lamar Johanson, Dean of the School of Arts and Sciences at T.S.U. Dr. Walter was concerned with Plaintiff's forthcoming absence from T.S.U. for 7 days while he was teaching at T.A.M.U. This absence would have directly conflicted with Plaintiff's duty developing the Hydrology Program at T.S.U. Also, the August 7, 1984, memorandum addressed Dr. Walter's concerns that Sashi Mathur would not be able to competently teach Plaintiff's classes in his absence, which Plaintiff had requested. On October 23, 1984, Dr.Barry Thompson informed Robert Fain that he disagreed with Plaintiff's proposal of teaching half his classes at T.A.M.U.

On November 12, 1984, in a letter to T.S.U.'s Tenure Committee, plaintiff requested tenure even though he was no longer confident of the future success of the hydrology program he was hired to implement at T.S.U. On April 20, 1984, Mr. Rueben Walter, Head of the Department of Physical Sciences at T.S.U., recommended that Plaintiff be granted tenure. However, on November 13, 1984, Mr. Walter recommended that tenure not be granted to Plaintiff. On November 13, 1984,Plaintiff corresponded with DR. Thompson about Dr. Walter's decision to rescind his positive tenure recommendation. On November 29, 1984, Plaintiff again wrote the Tenure Committee at T.S.U. concerning Dr. Walter's negative tenure recommendation. On December 3, 1984, the Tenure Review Committee voted 7 to 1 to not grant Plaintiff tenure. Plaintiff was informed of this on December 14, 1984. T.S.U.'s President Barry Thompson, reviewed the recommendation of the Review Committee. He found no cause to revise their recommendation.

Plaintiff's employment at T.S.U. was terminated

on May 31, 1985.

DISCRIMINATION IN TERMS AND CONDITIONS OF EMPLOYMENT

Plaintiff asserts that he was subjected to disparate treatment because he is of Belgian national origin.

In order to prevail in an action for disparate treatment under Title VII, Plaintiff must show what he was treated differently, that his employer was aware of the discrimination and failed to remedy it, and that his employer acted with discriminatory motive. Teamsters v. United States, 431 U.S. 324(1977); McDonnell Douglas v. Green, 411 U.S. 792(1973);Meritor Savings Bank v. Vinson, 106 S.Ct. 2399 (1986).

McDonnell Douglas establishes a framework for the order and burden of production of proof in an action under Title VII for disparate treatment. First, the plaintiff must establish a prima facie case of disparate treatment. Proof of a prima facie case raises an inference of discriminatory motive, which the defendant may rebut by articulating a

legitimate, non-discriminatory reason for actions complained of. Id. If the defendant successfully meets his burden, the plaintiff must then show that the reason articulated by the defendant was pretextual, and was not the true reason for the defendant's action. Id.

McDonnell Douglas, a case involving the defendant's refusal to hire the plaintiff, set out four elements which the plaintiff must prove in order to establish the prima facie case. Although the specifications of proof differ with the circumstances of each particular case (id.); see also Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the general framework remains the same: " Plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the act." Teamsters, 431 U.S. 324(emphasis added).

The general necessary elements to establish the McDonnell Douglas prima facie case in a case of discrimination with respect to national origin are:

(1) the plaintiff belongs to a protected group; (2) the plaintiff was similarly situated to other employees who did not belong to a protected group; (3) certain action was taken with respect to the terms and conditions of the plaintiff's employment which was not taken against similarly situated non-protected employees under similar circumstances. Under each of Plaintiff's complaints, the Court finds that the first element of the prima facie case has been met.

Plaintiff first claims that he was discriminated against because of national origin with respect to compensation. The facts indicate that plaintiff was not paid less than native-born citizens.3/ (see end of transcript).

Additionally, Plaintiff did not have substantially the same responsibilities as the three full professors named in his complaint. Even though Plaintiff was Director of the Hydrology Program, he supervised only one subordinate, Sashi Mathur. The other professors were directors of established programs at T.S.U. and each supervised a number of

employees. Thus, the Court finds that Plaintiff failed to establish a prima facie case on his claim of discrimination in compensation based on national origin.

Plaintiff's next complaint was that because of his national origin he was required to complete a two year " probationary period" instead of the customary one year before being considered for tenure. Plaintiff offered no evidence that the two year"probationary period" was required because of his Belgian national origin. To the contrary, Dr. Robert Fain, Director of Academic Affairs testified that the two year " probationary" period was Plaintiff's idea. However, Dr.Tom Hinkson stated that Plaintiff welcomed the two-year tenure period in order that he have time to prove himself. Additionally, Plaintiff himself testified that he considered tenure ab initio, that is coming to the institution with tenure, as a special favor evincing a lack of confidence in the professor and in his character. Regardless of this fact, the Court is convinced from the evidence presented 4/(see end

of transcript) that the two year " probationary" period was not based on Plaintiff's national origin. Therefore, Plaintiff has failed to establish a prima facie case on this claim.

Plaintiff's next complaint is that he was denied tenure because he recommended and hired Shashi Mathur, a non-caucasian of Indian nationality, for the position of assistant professor. The Court finds that in no way does the hiring of Professor Mathur have any bearing on Plaintiff's complaint of dis crimination based on his national origin. Additionally, the Court notes that Professor Mathur was in fact hired by T.S.U. and is still employed at T.S.U. in the Hydrology Department. Again, Plaintiff has failed to establish a prima facie case on this claim.

Plaintiff's final complaint is that he was denied tenure based on his national origin. Dr. Alice Cushman, Professor of English at T.S.U. and a member of the Promotions and Tenure Committee testified that Plaintiff had not been granted tenure because of his lack of publications5/(see end of transcript) and his lack of community service. Dr.Cushman further

stated that Plaintiff was evaluated solely on the basis of the information he provided to the Tenure Committee as part of his candidate packet and that there was no mention of Plaintiff's nationality at the tenure Committee meetings. Furthermore, there were no differences in the requirements for tenure based upon nationality.

From all the evidence presented, the Court finds that Plaintiff has failed to establish a prima facie case of discrimination based on national origin on any of his claims. Additionally, the Court notes that from observing the personality and demeanor of Plaintiff as a witness it was evident that Plaintiff would be a difficult person with whom to work. Throughout the trial, it was evident that Plaintiff's personality could create a number of conflicts in the workplace.

Accordingly, the Court will enter a judgment ordering that Plaintiff take nothing by his suit and that it be dismissed.

Signed this 31st day of August, 1987

ELDON B. MAHON
UNITED STATES DISTRICT JUDGE

Footnotes:

1/. In the Spring of 1984 Shashi Mathur was hired as Associate Director of the Hydrology Program and was under Plaintiff's supervision.

2/. There are no colleges or universities in Texas which award undergraduate degrees in Hydrology. Only the Universities of Arizona and New Mexico award undergraduate degrees in Hydrology.

3/. The salary paid to Plaintiff was not significantly less than the amount paid to other full professors at T.S.U. Plaintiff was paid $31,500 for a nine month period. The salary range for full professors was from $ 28,393 to $38,139 for a nine-month period. Plaintiff's salary was at most only 5% less than other department heads. Thus the mean average for full professors for a nine-month period was $32,892.00.

4/. Dr.Fain also testified that the customary probationary period is 7 years for a person with no experience, and any amount less than 4 years is a special situation. Also, the three professors who were given tenure after one year were formerly full professors.

5/. Plaintiff's last publication was in 1974, which is ten years from the time he applied for tenure at T.S.U. in 1983

TRANSCRIPT

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-1748
Summary Calendar

ROGER J. DE WIEST,
Plaintiff-Appellant,

versus

TARLETON STATE UNIVERSITY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(CA-4-85-212-E)

(April 19, 1988)

Before CLARK, Chief Judge, WILLIAMS and DAVIS, Circuit Judges. PER CURIAM:*
(for * see end of Judgment)

This is a Title VII civil rights case (42 U.S.C.§ 2000e et seq.). Appellant, Roger De Wiest, claims discrimination against him in the terms and conditions of his em-

ployment on the faculty of Tarleton State University (TSU), Stephenville, Texas. Appellant is a naturalized United States citizen of Belgian origin. Upon trial before the district court, there was a finding that appellant had not established a prima facie case under the statute, and it rendered judgment for appellee Tarleton. After a careful review of the record, we affirm the judgment.

Appellant De Wiest was hired in July 1983 by TSU as a distinguished professor and director of the hydrology program. The contract provided a two year probationary period prior to tenure.

In undertaking to establish a prima facie case, appellant claimed that his salary was $6,000 a year less than that of three professors hired at approximately the same time and was less than his successor and other department heads. He also alleged that the two year probationary period was diffe-

rent from the customary one year. A major claim was that he was denied tenure because he recommended and hired a non-caucasian of Indian nationality for the position of assistant professor in the hydrology program which he headed.

Before entering upon a specific analysis of the findings of the district court, it is well to point out that we are not as an appellate court empowered to weigh the evidence and draw our own conclusions. The Federal Rules of Civil Procedure provide that the district court's "[f]indings of fact shall not be set aside unless clearly erroneous." Fed.R.Civ.P.52(a); Williamson v.Brown,646 F.2d 196, 200(5th Cir.1981). A finding of fact is clearly erroneous only when after a review of all the evidence we reach the firm conviction that a mistake has been made. Marable v.H.Walker & Assoc., 644 F.2d 390, 395 (5th Cir. 1981). In reviewing a finding of fact, this Court may neither re-

weigh the evidence nor retry the issues nor substitute its judgment for that of the district court. Williamson v. Brown, 646 F.2d 196 200 (5th Cir. 1981). It is for the district court to weigh and evaluate the credibility of the witnesses. The record reveals that the district court carefully carried out its proper role in this case. The vituperative and ill-tempered reply brief of appellant acting pro se, asserting that appellee's evidence consisted of lies, fraud, and intention to deceive, is without any showing of justification.

We consider each finding of fact by the district court in turn.

1. The first claim is of discrimination because of national origin with respect to compensation. Appellant was paid less than three full professors named in his complaint. The evidence revealed that the programs they supervised were substantially larger and involved a number of employees. The court found

no discrimination with respect to compensation. This finding is supported.

2. It is claimed that appellant was required to complete a two year probationary period, instead of the customary one year, because of his national origin. Appellant offered no evidence that the two year probationary period was required because of his Belgian origin. There was evidence in the record, which the district court had the right to believe, that the two year probationary period was appellant's own idea and that he expected to have such a period rather than to come to the school with tenure.

3. The complaint is that he was denied tenure because he recommended and hired a non-caucasian of Indian nationality for position of assistant professor. The court found that there was no evidence that the hiring of this assistant professor had any bearing at all on plaintiff's complaint of

discrimination. The assistant professor was in fact hired by TSU and is still employed at TSU.

4. Appellant finally complains that because of his national origin he was denied tenure. The district court had the right to credit testimony of a member of the Promotions and Tenure Committee that he had not been granted tenure because of his lack of publication and that there was absolutely no discussion of his national origin at all in the deliberations. The evidence showed that plaintiff's last publication was in 1974, ten years before he applied for tenure. Appellant submitted as part of his brief publications which took place after he was denied tenure, which, obviously, the Promotion and Tenure Committee did not have before them at the time of their decision.

In addition, mentioned in the opinion of the opinion of the district court but not the subject of a specific finding, the

record reveals that appellant undertook teaching also at Texas A & M University and that there was some friction with his superiors because of his frequent absence from the TSU Campus and the attention being given to his teaching assignment at Texas A & M.

5. The district court made its own additional finding, not responding to appellant's claims, which was based upon the court's own observation of appellant at the trial. The court made the finding " that from observing the personality and demeanor of plaintiff as a witness, it was evident that plaintiff's personality could create a number of conflicts in the workplace."

In view of all these factual conclusions, the district court concluded that there had been no discrimination against appellant based upon origin. The district court properly made its analysis on the three steps of,first, a prima facie case showing, then

a response by defendant to such a case, and finally the undertaking to show the non-discriminatory response as a subterfuge, McDonnell Douglass v. Green, 411U.S. 792, 802, 93 S.Ct. 1817,1824, 36 L.Ed.2d 668(1973). When a Title VII case is fully tried on the merits as was this case, the appellate court is no longer concerned with the three step analysis of shifting evidentiary burdens. Instead, our review properly centers on the "ultimate question of discrimination vel non." United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 714,103 S.Ct.1478, 1481, 75 L.Ed.2d 403(1983). We conclude that the finding of the district court that there was no discrimination against appellant on the basis of national origin must be upheld as not "clearly erroneous".

AFFIRMED.

* Local Rule 47.5 provides: " The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.